

Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2021 – Italy

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In 2021, next to the activity of the Italian Competition Authority (“ICA”) and of the courts, the Italian legislator looked into competition law as a tool to unleash economic growth against the backdrop of the ongoing Covid-19 outbreak.

A “competitive” Recovery and Resilience Plan

In the opening speech of his government, Prime Minister Mario Draghi announced the intention to introduce, in the context of the Italian Recovery and Resilience Plan (“PNRR”), a competition reform based on proposals from the ICA. In March 2021, the ICA responded to this opportunity by publishing its [proposals of competition reform](#). The competition reform was then included in the [final version of the PNRR](#) as an “enabling” reform, which allows the full implementation of subsequent reforms. On 3 December, the government presented to the Parliament a [draft bill on competition reform](#), which transposes several ICA’s suggestions. First of all, the draft bill aims at establishing a big novelty for companies and private practices involved in antitrust proceedings before the ICA: the settlement procedure. Settlement procedures, despite having been used for some time by the European Commission, are currently not explicitly regulated by Italian competition law. Second, merger control will be based by law on the SIEC test, compared to the current assessment formally based only on verifying whether the merger creates or strengthens a dominant position. Third, *ex officio* ICA’s powers will be increased to allow scrutiny – up to 6 months following completion – of transactions exceeding only one of the two turnover thresholds for notification or a worldwide cumulative turnover of EUR 5 billion, in case the ICA detects actual competitive risks, taking into account also effects on innovative SMEs. Moreover, further adjustments will align the turnover calculations for banking and financial institutions and for the assessment of joint ventures to the Commission’s practice. It remains to be seen whether the draft bill on competition will retain all its novelties at promulgation, after the parliamentary journey, and what impact it will have on the economic recovery, coupled with the regulatory simplification and the “opening” of service concessions, which are also part of PNRR’s “enabling” reforms.

The transposition of the ECN+ Directive

On a related note, the Italian legislator also transposed the [ECN+ Directive](#). Through legislative

decree No. 185 of 29 November 2021, Italian competition law was amended, so as to strengthen the sanctioning powers of the ICA, introducing periodic penalty payments and broadening the situations that may allow the ICA to impose fines (even on natural persons). In addition, the ICA's powers to impose behavioral or structural remedies when finding an anticompetitive agreement or abuse of dominance were definitively recognized, although the matter was heavily debated in the past, since Italian competition law did not explicitly confer such powers to the ICA. In addition, the legislative decree in question broadened the ICA's powers for imposing sanctions on associations of undertakings and introduced immunity from criminal charges as a result of leniency applications for certain bid-rigging conducts. Overall, the transposition of the ECN+ Directive has definitely strengthened the role of the ICA, also within the ECN: the ICA was granted significant powers to request cooperation from other national competition authorities and, in turn, was obliged to ensure its cooperation upon their request.

Agreements and abuses: the Amazon cases and the ICA's new enforcement trend against abuses of economic dependence

The ICA imposed a fine of over EUR 1 billion and behavioral remedies on Amazon for an abuse of dominant position in the market for e-commerce logistics services. The behavior consisted in encouraging sellers on Amazon to use Amazon's own logistic service, called *Fulfillment by Amazon* (FBA), by tying to the use of FBA the access to a set of exclusive benefits essential for gaining visibility and increase sales on amazon.it ([A528 – FBA Amazon](#)). This decision concludes an investigation opened in April 2019 and follows the order of the EU General Court in [T-19/21, Amazon.com and o. v Commission](#) dismissing as inadmissible the action brought by Amazon against the parallel investigation opened by the Commission in November 2020 on the same anti-competitive behavior ([AT.40703 – Amazon – Buy Box](#)). In fact, the Commission's investigation covered the whole EEA with the exception of Italy, precisely because the ICA had already opened its own investigation, and Amazon challenged it because it should defend itself against two different authorities and the situation could lead to a divergent application of EU competition law and the imposition of divergent penalties.

Previously this year, the ICA imposed fines on Apple and Amazon for engaging in an anti-competitive agreement consisting in contractual clauses preventing certain Apple (official and non-official) resellers from accessing Amazon's marketplace services in Italy ([I842 – Vendita prodotti Apple e Beats su Amazon marketplace](#)). This decision by the ICA is noteworthy because it confirms the ICA's interest in scrutinizing anticompetitive agreements hampering competition in online markets.

Along the same line, the ICA has also opened an investigation into an alleged anticompetitive agreement among some of the main insurance companies/brokers and online comparison tools ([I856 – Comparatori di prezzo/Scambio di informazioni polizze RCA](#)). According to the ICA, the anticompetitive agreement would have taken the form of an exchange of competitively sensitive information through periodic reports prepared by online comparison tools in relation to the insurance premiums offered through their platforms. The undertakings subject to investigation have recently offered commitments, and the ICA decided in December 2021 to initiate a market test and assess their suitability to remove any competition concern.

Lastly, the ICA seems to be making more and more use of its competence to fight abuses of

economic dependence. In fact, in the course of 2021 the ICA fined Poste Italiane for more than EUR 11 million (A539 – *Poste Italiane/Contratti fornitura servizio recapiti*) and opened three investigations against the fast-food company McDonald's (A546 – *Franchising di McDonald's*), the fashion firm Original Marines (A550 – *Catena di franchising Original Marines*) and the telecom operator Wind/Tre (A547 – *Condotte di Wind Tre a danno dei rivenditori*) for alleged abuses of economic dependence carried out against their respective franchisees or resellers. It remains to be seen whether this will become a new enforcement trend of the ICA but, for now, it is worth noticing that certain potentially abusive conducts do not have to be carried out by undertakings dominant on a certain relevant market, in order to be considered illegal.

Merger control: remedies and referrals

In 2021, the ICA authorized several high-profile transactions in sectors which are at the heart of the post-pandemic recovery. These included the clearance, subject to both behavioral and structural remedies, of the merger between Nexi and SIA involving eleven markets related to payment services, two of which were the subject of the conditions (C12373 – *Nexi/SIA*). This transaction is part of the worldwide consolidation wave of the payment services sector and this is reflected in the geographical definition of the markets by the tension between the increasingly cross-boundary nature of the services and the regulatory frameworks still (mostly) defined at national levels.

Moreover, the ICA conditionally authorized Cellnex's acquisition of the CK Hutchison's infrastructure for mobile telecommunications in Italy (C12358 – *Cellnex Italia/CK Hutchison Networks Italia*). Cellnex thus became the second big player in the market together with INWIT, a joint-venture combining Tim and Vodafone's infrastructure in Italy, subject to a remedy package by the Commission (M.9674 – *Vodafone Italia/Tim/INWIT JV*). Therefore, remedies imposed by the ICA on Cellnex complement INWIT's EU remedy package to ensure the openness of the infrastructure to third service providers and its activity in less populated areas.

It is also noteworthy that the ICA conditionally cleared a concentration between two major publishers (C12393 – *Arnoldo Mondadori Editore/De Agostini Scuola*). In the decision, the ICA analyzed in detail the market for secondary school textbooks, noting some peculiar features, such as the role of teachers and sale agents in the competitive dynamics. This market is highly concentrated and was the subject of a cartel investigation at the same time (I848 – *Problematiche concernenti l'attività di promozione nel mercato dell'editoria scolastica*).

In addition, the ICA activated in 2021 its power under Article 9 of the European Merger Regulation to request a referral from the European Commission in relation to a concentration having European dimension. More precisely, Enel X (i.e. a branch of the former electric monopolist in most of Italy, dedicated to innovative services) and the German carmaker Volkswagen had notified to the European Commission the creation of a joint venture for installing, operating and maintaining a network of publicly accessible high-power charging stations for electric vehicles across in Italy (M.10311 – *Enel X/VWFL/JV*). The ICA considered that the transaction could threaten to significantly affect competition in Italy, and asked the Commission to refer the case. The Commission disposed the full referral of the concentration to the ICA which, after opening an in-depth investigation, cleared the concentration unconditionally (C12404 – *Enel X-Volkswagen Finance Luxembourg /JVC*). The referral shows that the ICA is ready to adopt a more proactive approach when it deems that certain concentrations (even those having a European

dimension) could have an adverse impact on competition in Italy. In these cases, it seems necessary for undertakings to take the possibility of a downward referral into account, also in light of the different regulatory framework governing concentrations in Italy. For example, Italian merger control law prohibits concentration from being implemented prior to their notification (and not prior to their clearance as, instead, the European merger regulation mandates).

Consumer protection: Facebook and beyond

In addition to its mandate as competition-law enforcer, the ICA is also in charge of consumer protection. In this field, as already recalled by [Thomas Tiede](#) in this blog, a sanction was imposed on Facebook ([IP330 – Facebook-Raccolta utilizzo dati degli utenti](#)) for failure to comply with a 2018 decision ([PS11112 – Facebook-Condivisione dati con terzi](#)). The 2018 decision qualified as unfair practice the company's advertisement that its services were free of charges, without making users aware of the fact that their data were used as compensation for the social media services provided.

Moreover, although Italy has not yet transposed [Directive \(EU\) 2019/2161](#) (which, *inter alia*, requires Member States to set the maximum fine for certain unfair commercial practices to at least 4% of the trader's annual national turnover), the ICA will undoubtedly play a very interesting role in upcoming consumer protection actions, especially as the loosening of the COVID-19 restrictions will make it easier for the ICA to carry out unannounced inspections (that the ICA has only recently restarted).

Italian courts between public and private antitrust enforcement

In the course of 2021, furthermore, the ICA was not left alone in its role of competition law enforcer. Italian courts contributed as well to shape significant developments of competition law and policy.

In July 2021, the administrative court of first instance competent for competition matters (TAR Lazio) annulled an ICA decision that had fined the four main telecom operators in Italy for an alleged anticompetitive agreement. More precisely, starting from 2015, several telecom operators started invoicing their bills every four weeks rather than on a monthly basis. This essentially entailed an increase in price of 8.6% over the year and led several consumer associations to complain. Both a resolution by the Italian telecommunications authority and a new law approved by the legislator in 2017 imposed operators to establish invoicing period of one or more months (and not less). All telecom operators left unchanged the annual invoices and decided to pass from 13 to 12 annual bills by increasing the monthly invoice by 8.6% (through a so-called "*repricing*"). The ICA opened an investigation and fined the four main telecom operators for an alleged anticompetitive agreement consisting in the setting of a common strategy on how to handle this passage from 13 to 12 annual bills (i.e., through the repricing or otherwise) in order to limit consumers' mobility. The TAR Lazio entirely annulled the ICA's decision deeming that it had disregarded key elements of the opinion rendered during the case by the Italian telecommunications authority and it based the finding of the infringement on inconclusive and contradictory documents, some of which dated even before the starting date of the cartel found by the ICA.

Lastly, as we summarized in [a previous post on this blog](#) indicating the main developments in competition law and policy in Italy for 2020, Italian courts are making front-line preliminary references to the Court of Justice, which promise to be quite interesting in the matter of abuses of dominance. In 2021 the hearing of [Case C-377/20, Servizio Elettrico Nazionale](#) took place and Advocate General Rantos delivered his much discussed opinion on the same case (see [here](#) for a post on this blog discussing the main implications of this opinion). The judgement by the Court of Justice promises to be one of the landmark and most referenced judgments on the matter of abuse of dominance, especially in relation to data-related practices.

In relation to private antitrust enforcement, in 2021 the first known Italian judgment on the European *Trucks* case ([AT.39824 – Trucks](#)) was published. In the context of a follow-on action based on the settlement decision adopted by the European Commission in 2016, the Court of Naples found that an undertaking having purchased a truck from a dealer of a cartel was entitled to claim from the latter compensation for the overcharge suffered. Although the Court of Naples had asked for an expert opinion to quantify the damages suffered by the claimant, the opinion was inconclusive and ultimately suggested the Court to quantify such damages on an equitable basis. As a result, the Court awarded the claimant compensation for 15% of the truck's net purchase price.

Conclusion

To conclude this short overview, ICA's decisions and court judgments discussed here are not exhaustive. As done in 2020, we selected here those that we thought shaped competition law and policy the most in Italy in the course of 2021. We think that this selection offers an adequate perspective for 2022, but please feel free to comment and add your views, as it is in the spirit of a blog.

Disclaimer: The information and views set out in this post are the authors' own and do not necessarily reflect the official opinion of their professional organizations.

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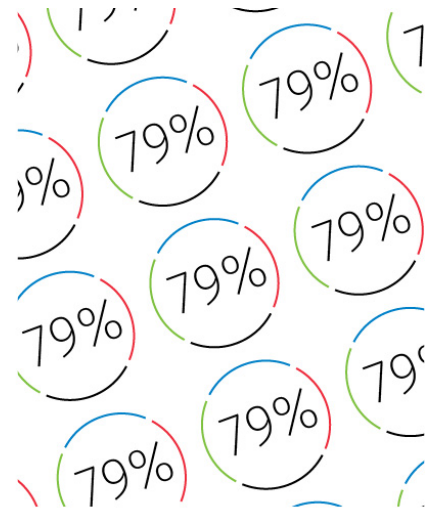
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